

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3694 OF 2019

Yashika Balkrishna Berde } Petitioner
 versus
Union of India and Ors. } Respondents

Ms.Neha Philip for the petitioner.

Ms.Anusha Amin for respondent nos. 1
and 3.

Ms.M.P.Thakur-AGP for State.

CORAM :- S. C. DHARMADHIKARI &
 B. P. COLABAWALLA, JJ.

DATE :- APRIL 1, 2019

P.C. :-

1. By this writ petition under Article 226 of the Constitution of
India, the petitioner seeks the following reliefs:-

“a. For a writ of declaration or any other appropriate writ,
order or direction in the nature of declaration, declaring section
3(2)(b) of the Medical Termination of Pregnancy Act, 1971 to
the limited extent that it stipulates a ceiling of 20 weeks for an
abortion to be done under Section 3, as ultra vires Article 14
and 21 of the Constitution of India;

a. For a writ of declaration or any other appropriate writ,
order or direction quashing section 5(1) of the Act to the
limited extent that it restricts abortion under section 5 to a
restricted field where it is immediately necessary to save the
life of the pregnant woman;

b. For a writ of declaration or any other appropriate writ,
order or direction in the nature of declaration, declaring that
the case of the Petitioner is a fit case for exercising jurisdiction

under Section 5 of the Medical Termination of Pregnancy Act, 1971.

c. For a writ of mandamus or any other writ, order, or direction in the nature of mandamus directing the Respondents to-

i. constitute a Medical Committee for the examination of the Petitioner to assist this Hon'ble court in arriving at a decision on the plea of the Petitioner;

ii. Allow the Petitioner to undergo Medical Termination of Pregnancy at a medical facility of her choice.

d. For a writ of mandamus or any other writ, order, or direction in the nature of mandamus directing the Respondents to set up appropriate Medical Committees in each district in the State of Maharashtra to assess the pregnancy and offer MTP to the Petitioner and other women in need of the procedure beyond the prescribed 20 weeks limit.

e. For an order directing Respondent No.1 to produce the report of MTP Committee which included the Health Secretary, Mr.Naresh Dayal, former Director-General of the Indian Council of Medical Research and Dr.N.K.Ganguly as its members as stated in para 9 of the petition."

2. The prayers in the writ petition seek a larger relief, but we are not concerned presently with the same for the petitioner and her advocate proceeded on the footing that in the event this court grants a prayer of the petitioner to issue a direction to the respondents to constitute a Medical Committee for the examination of the petitioner, that would assist her to undergo the medical termination of her pregnancy at the medical facility of her choice. Since this being the final relief, when the petition was circulated on 26th and 27th March, 2019, we passed the following orders:-

26th March, 2019:-

1. Leave to amend.
2. We have found that this petition cannot be prosecuted with an assumed name. More so, because the identity is declared and disclosed by producing the Unique Identification Card and setting out its details. In the circumstances, if the amendment is not carried out on or before 27th March, 2019, the writ petition to stand dismissed for want of prosecution, without any further reference to the court.
3. Stand over to 27th March, 2019.

27th March, 2019:-

1. The petitioner before us has filed this petition seeking a direction to allow her to terminate the pregnancy through the mechanism under the Medical Termination of Pregnancy Act, 1971.
2. It is claimed that Section 3 of this Act allows termination of pregnancy by registered medical practitioners even if the length thereof exceeds 20 weeks.
3. Presently the petitioner is in the 22nd week of her pregnancy and she says that the medical opinion is that the continuance of pregnancy would involve grave injury to the mental health of the petitioner.
4. The projection before us that the mental condition of the petitioner is not such as would enable her to continue with the pregnancy. Her mental health is not good and opinion of the private medical practitioner is relied upon in that behalf.
5. In the morning session, we indicated to the petitioner's advocate that given the nature of the opinion of the private medical practitioner, it cannot be said that her mental health is such that continuance of pregnancy would involve a risk to her mental condition. That is not a conclusive opinion. Yet, the petitioner's advocate, on instructions, maintains that the petitioner is not in a position to continue with the pregnancy as she would be required to be under medication throughout and it would also have some ill effect.

6. In the circumstances, strictly to examine her mental health, the request is to constitute a Medical Board.

7. In the above facts and circumstances and peculiar to this petitioner, we request the Dean, Sir J.J. Group of Hospitals, Mumbai to constitute a Medical Board so as to examine the petitioner with regard to her mental health and submit a report to this Court.

8. The learned AGP Mrs.Thakur says that she will communicate this order to the Superintendent/Dean of the above hospital and ensure that report with regard to the mental health of the petitioner will be forwarded to this Court on next date.

9. We post this petition on 1st April, 2019.

3. Firstly, the petitioner could not have prosecuted the petition in an assumed name, particularly after disclosing her identity and producing the relevant documents as Annexures to the petition. Thereafter, the petition was amended and the name of the petitioner was disclosed. After the amendment was carried out, we acceded to the request of the petitioner's advocate and directed constitution of a Medical Committee.

4. The writ petition invokes the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as "the Act of 1971") and particularly section 3 thereof. Section 3 reads as under:-

"3. When pregnancies may be terminated by registered medical practitioners. - (1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,-

(a) where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or

(b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are,

of opinion, formed in good faith, that -

(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health, or

(ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Explanation I. - Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant women.

Explanation II. - Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonable foreseeable environment.

(4) (a) No pregnancy of a women, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a mentally ill person, shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman."

5. A bare perusal of this provision indicates that notwithstanding anything contained in the Indian Penal Code, a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

6. The term “registered medical practitioner” is defined in section 2(d) and section 2 also contains an important definition, namely, of the term “mentally ill person”. That is to be found in clause (b) of section 2 to mean a person who is in need of treatment by reason of any mental disorder other than mental retardation.

7. Then, sub-section (4) of section 3 does not allow termination of pregnancy of a woman, who has not attained the age of 18 years or who, having attained the age of 18 years, is a mentally ill person, except with the consent in writing of her guardian. By clause (b) of sub-section (4), a pregnancy can be terminated with the consent of the pregnant woman.

8. The petitioner in this case has stated that she resides at Thane. She is 20 years’ old. She resides with her maternal aunt. Exhibit ‘A’ is a copy of the proof of her residential address and

date of birth. On 13th March, 2019, the petitioner complained about stomach ache and other physical discomfort. The doctor recommended sonography and it was discovered that the petitioner is 22 weeks' pregnant on that date. In the light of the above discovery, a test was carried out and it was found that the petitioner is pregnant with an average gestational age corresponding to 22 weeks and 2 days. Reliance is placed upon Exhibit 'B' which is a copy of the USG Obstetric report dated 13th March, 2019. The petitioner was recommended to consult a psychiatrist and was asked to take a psychiatry test on 20th March, 2019. Since heavy reliance is placed on a copy of the Certificate as also the Mental Capacity Assessment Report dated 20th March, 2019, we reproduce the same. They read as under:-

"CERTIFICATE"

This is to certify that Ms YASHIKA BERDE is under my care from 19/3/19. She is suffering from Paranoid disorder + Anxiety Disorder secondary to her medical condition + Borderline Intellectual Functioning. She has been advised medication for her mental condition.

On her mental health capacity assessment we gather that inspite of her mental condition she has the capacity to give consent for her medical/psychiatric problems as well as the decision regarding her pregnancy. Her clinical evaluation as well as assessment are equivocal about her ability to motherhood.

Her current medical condition requires medication, family support and due legal consideration in the best interest of the client as well as the unborn child.

Dr.Ashish Deshpande
PSYCHIATRIST
Reg. No. 65975

Mental Capacity Assessment

NB The Mental Capacity Act's first principle is that a person must be assumed to have capacity to make a decision or act for themselves unless it is established that they lack capacity in relation to those matters.

1. **Individual Details**

Name: Yashika Berde

Address: Shreeprastha Complex, Bldg. No. 70, 3rd road ..., Nallasopara West.

Date of Birth: 15th February, 1999

Location at Time of Assesment: 2.30 p.m.

2. **Decision Requiring Test of Mental Capacity
(provide detials)**

Discontinue with pregnancy.

NB: Before deciding that someone lacks capacity to make a particular decision, it is important to take all practical and appropriate steps to enable them to make that decision themselves

3. **Two-Stage Test of Mental Capacity (See Code of Practice Chapter Four)**

- a. Does the person have an impairment of the mind or brain, or is there some sort of disturbance affecting the way their mind or brain works? (It doesn't matter whether the impairment or disturbance is temporary or permanent.) Provide evidence.

NB: If a person does not have such an impairment or disturbance of the mind or brain, they will not lack capacity under the Act.

Suspiciousness, visual hallucinations, paranoia

- b. Does that impairment or disturbance mean that the person is unable to make the decision in question at the time it needs to be made?

Can the person:

- | | | |
|-----|--|------|
| (a) | Understand the information relevant to the decision? | Yes✓ |
| (b) | retain that information? | Yes✓ |
| (c) | use or weigh that information as part of the process of making the decision? | Yes✓ |
| (d) | communicate his/her decision (whether by talking or any other means)? | Yes✓ |

Provide evidence in respect of the person's ability in relation to each of these four elements of the test:

The client understands the consequences of continuing with pregnancy & responsibility attached with motherhood hence she has expressed her desire to discontinue as she feels she is not ready for the same.

NB: If a person cannot do one or more of these four things, they are unable to make the decision.

4. Outcome of Mental Capacity Test

On the balance of probabilities, there is a reasonable belief that:

The person has capacity to make this particular decision at this time	✓
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or

The person **does not have** capacity to make this particular decision at this time

Details of Assessor

Assessor:

Signature:

Designation:	Dr.Ashish Deshpande PSYCHIATRIST Reg. No. 65975
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Date:	20/3/19.
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Time:	4 pm."
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9. The petitioner says that she desires to terminate her pregnancy, but on account of section 3 of the Act of 1971, she was not allowed to terminate it. The continuation of the pregnancy and the enforcement of the act has led the petitioner to undergo psychological, mental and physical trauma. The petitioner, in para 6 of the petition, says that she has been informed of the outcome of the said pregnancy and wishes to medically terminate the same. Thereafter, several provisions of the Act are referred to and the petitioner says that the Federation of Obstetric and Gynecological Societies of India has carried out certain study and a report of that study reveals that abortion process at 20 weeks and 25 weeks carries the same risk. The further paragraphs of the petition relies upon certain opinions and observations and as held above, we need not refer to the same in further details. We are not concerned with the legality and validity of the provisions of the Act since the challenge to the legality and validity of certain provisions of the Act is not pressed before us.

10. When the Medical Board was directed to be constituted and thereafter duly constituted, the petitioner appeared before it and was examined, a report was forwarded to us. The matter was placed today and a copy of this Mental Health Report was provided to the petitioner's advocate in the morning session. At

her request, the matter was placed in the afternoon session and to enable her to take instructions.

11. The mental health report states as under:-

**“PSY No: 241/2019
Date: 30/03/2019**

**To,
The Dean,
Sir J.J. Group of Hospitals
Byculla, Mumbai 400 008**

Subject: Psychiatric Evaluation In Case Of Writ Petition 3694 of 2019, dated 27/03/2019 from the Deputy Registrar writ petition Branch Civil Department High Court, Mumbai.

Reference: 1) Letter no 3274/19/18 Dated: 28/03/2019 from Dean JJ Hospital Mumbai
2) Letter no 3436/19 Dated: 30/03/2019 from Dean JJ Hospital Mumbai

Identification Mark: Black mole over left forearm.
Aadhar No. No.: 893773438117
Informant: Aunt (Mrs Kumudini)

MENTAL HEALTH REPORT

Case referred by Hon.Court for Mental Health evaluation. A committee was formed by the Dean (Ref. 1) with Professor and HOD, Dept. Of Psychiatry, Dr.V P Kale, as Chairperson of committee. Professor and HOD, Dept Of Obstetrics and Gynecology, Dr Ashok Anand, Professor and HOD, Dept. Of Medicine Dr Vidya Nagar and Professor and HOD, Dept. Of Radiology Dr Shilpa Domkundwar were constituted as members of committee. This committee was constituted on 27/03/2019 and the committee members submitted their reports to the chairperson of the committee. Another committee (Ref. 2) comprising of 3 Mental Health Experts, Professor and HOD, Dept. Of Psychiatry, Dr V P Kale, Associate Professor Dept. Of Psychiatry Dr M Umate and Assistant Professor Dept. Of Psychiatry Dr A Ramakrishnan was formed.

Petitioner YBB is 24 weeks pregnant and seeks termination of pregnancy. She says that she had gone on an outing in a college group and had gone to a room with a boy. She alleges that even when she resisted, the boy forced himself on her and had sexual intercourse with her against her will. She further claims that he threatened with dire consequences if she revealed this to anyone. She said that she realized that she missed her periods in September and informed the boy who further threatened her and asked her not to contact him again.

She did not disclose about her pregnancy out of fear and shame. She informed her aunt about her missed period in February but did not tell her the reason in spite of being asked. Her pregnancy was discovered in a hospital where she was taken for treatment of abdominal pain. She said she did not file a police complaint against the boy for sexual assault as she feared the stigma and family members decided not to file a Police case.

Her aunt noticed her behavioral changes like reluctance to go out in public.

She was shown to a Private Psychiatrist as suggested by her legal adviser and was issued a Certificate on 19/03/2019 but both she and her aunt say that she has not taken any treatment. She has not received/is not receiving any medications which will have adverse affect on the fetus.

No history of major Medical or Surgical illness No history of substance use No history of suspiciousness or hearing of voices inaudible to others, disinhibited or disorganized behavior, No history of pervasive sadness of mood or any grossly abnormal behavior.

She was examined on 28/03/2019, 29/03/2019 and 30/03/2019 by Professor and Head of Department, Associate Professor, Assistant Professor as a committee member.

IQ Testing was done by a Clinical Psychologist as advised by committee, on 29/03/2019 which is suggestive of IQ 93, Average Intelligence, which ruled out her intellectual disability.

Physician as a committee member examined her on 28/03/2019 and 30/03/2019 and found No significant clinical and Biochemical abnormalities.

Radiologist as a committee member performed a USG (Obs and Fetal anomaly scan) dated 30/03/2019 which is

suggestive of Single live intrauterine gestational sac with mean gestational age of 24 weeks and 2 days with no lethal congenital anomaly.

Obstetrician and Gynecologist as a committee member examined her on 28/03/2019 and 30/03/2019 their finding are of Uterus 22 to 24 weeks, fundal height 22 cm.

On Mental Status Examination: She is conscious, cooperative and communicative and comfortable during the interview Mood euthymic, Speech and Thought continuous, coherent, relevant, was guarded regarding certain questions, No delusions and hallucinations, worried about being unwed mother and associated social stigma. Insight present; judgment intact.

IMPRESSION: No evidence of psychopathology (Mental Illness) at present.

CONCLUSION: 1) She is not suffering from any Mental Illness at present.

2) There is no evidence of grave disturbance to her Mental Health Status after assessment except normal reaction.

s/d

s/d

s/d

DR. V. P. KALE

Dr. M. S. Umate

Dr. Aparna Ramakrishnan

STAMP

STAMP

STAMP

Mental Health Expert

Mental Health Expert

Mental Health Expert

**Committee Of Psychiatrists constituted by Dean,
Grant Government Medical College
and
Sir JJ Groups Of Hospitals, Mumbai-08”**

12. When the matter was called out in the afternoon session, the petitioner's advocate submits that in this case the petitioner can invoke *Explanation* I below sub-section (2) of section 3 of the Act of 1971. She submits that we must treat this as a case of a pregnancy forced upon the petitioner and thus, it is a product of rape committed on her.

13. On a perusal of the mental health report, it is apparent that the petitioner may have stated before the medical board that she did not disclose about her pregnancy out of fear and shame. Pertinently, it is stated by her that she did not file a police complaint against the boy for sexual assault as she feared the stigma and family members decided not to file a police case. Pertinently, the contents of the report and the competence of the members of the Medical Board is not questioned.

14. We must deprecate the tendency of litigants taking chances in such matters by filing petitions before this court. The petitioner approached this court with a clear case that she can invoke sub-section (2) of section 3 of the Act as reproduced above for the simple reason that her pregnancy can be terminated by a registered medical practitioner on the satisfaction that though it has exceeded 20 weeks, this court can assist her by allowing her to terminate the pregnancy as the continuance of the pregnancy would involve a risk to the life of the petitioner, considering her mental health. That is how the whole petition proceeds and being allegedly in mentally delicate condition, she was referred to a psychiatrist and his opinion and report was sought. That was specifically sought on the issue as to whether she can continue the pregnancy or her mental health is at risk.

15. When the petition was filed in this court and argued, it was by highlighting her mental condition. Once this impression was given to the court based on the pleadings in the petition as also the arguments and the court was requested to pass the above orders and directions, then, subsequently, on receipt of the mental health report, the petitioner could not have turned around to urge that this court should apply *Explanation* I to the above sub-section. That means, she should be now allowed to urge that the pregnancy has been caused by rape. The explanation denotes that where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman. The word 'rape' has been inserted in the *Explanation* I and that has a specific legal connotation. Hence, the *Explanation* has to be specifically invoked by alleging that the pregnancy is caused by rape. It is conceded before us that there is no such allegation in the writ petition. There is not even a whisper throughout by the petitioner that the pregnancy has been caused by rape. Throughout, in the 22 weeks of pregnancy, she has not alleged at any time that the pregnancy has been caused by rape. Thus, there being no allegation, it would not be safe and proper on our part as well to allow the petitioner to now change her version and during the course of arguments,

particularly on receipt of the above reproduced Mental Health Report. The mental health report concludes that there is no evidence of mental illness at present. The conclusion is that the petitioner is not suffering from any mental illness at present and there is no evidence of grave disturbance to her mental health status after assessment, except normal reaction. The report is signed by the Professor and HOD, Department of Psychiatry, Sir J. J. Group of Hospitals, then the Associate Professor in that Department and finally, the Mental Health Expert. Thus, this is an opinion rendered by the experts after examining the petitioner for her mental condition. It is only if the mental health was to pose a grave risk to the continuation of the pregnancy that this court would have interfered in its extraordinary, equitable and discretionary jurisdiction under Article 226 of the Constitution of India. Thus, an apprehension was raised that there is a grave injury to her mental health. That is the reason which persuaded this court to direct the examination of the petitioner and only in relation to her mental condition. Once the Mental Health Report to the above effect is received, this court is not obliged to consider any other case of the petitioner and which is not even pleaded in the petition.

16. We are not obliged to take note of any general complaint or the submission of the petitioner's advocate that women have to suffer such pregnancies and they are not a product of their choices. We cannot go on a general presumption for we are considering the matter strictly within the ambit and scope of the Act of 1971. It is that Act which has been invoked and it is an Act to provide for termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto. We cannot be oblivious and unmindful of the Statement of Objects and Reasons leading to the enactment and after its amendment that this Act legalises termination of pregnancy on various socio-medical grounds. The Act is aimed at eliminating abortion by untrained persons and in unhygienic conditions, thus reducing maternal morbidity and mortality. It is in these circumstances that the Act as earlier enacted has been amended. The amendments are aimed at enabling the termination of pregnancy by registered medical practitioners. It is they who are absolved of the consequences that they may have to face, in the event they terminate the pregnancy otherwise than in accordance with this Act. It is in these circumstances, it would be highly unsafe to now allow the petitioner to raise an altogether different ground to enable her to terminate her pregnancy.

17. This petition is really an abuse of the process of this court for we find that this tendency has to be curbed. Nobody can come to this court as of right to seek a relief of the above nature. This court, in its writ jurisdiction, cannot pass an order contrary to law nor can its direction make a mockery of the rule of law. We are, therefore, not impressed by any general statement or submission of the petitioner. In the absence of clear pleadings and specific allegations, we are not inclined to grant any relief in our writ jurisdiction.

18. As a result of the above discussion, by relying upon the report of the experts and finding that there is no grave injury to the petitioner's mental health, we proceed to dismiss this writ petition. It is accordingly dismissed.

19. We would have ordinarily been justified in imposing heavy costs, but refrain from doing so. This order should serve a stern warning to those who approach this court by invoking the provisions of the Act and particularly section 3 thereof. If the ingredients thereof are not satisfied and if the jurisdiction is found to be grossly abused, then, hereafter, we would impose heavy costs on the parties approaching this court.

(B.P.COLABAWALLA, J.)

(S.C.DHARMADHIKARI, J.)